The Justice Conundrum: Africa's turbulent relationship with the ICC

By Jon Silverman

In the Harvard ILJ Vol 59(2), authors Courtney Hillebrecht and Alexandra Huneeus, with Sandra Borda, argue in "The Judicialization of Peace" that the International Criminal Court (ICC) and Inter-American Court of Human Rights, in their positive engagements with Colombia's long-running internal conflict, have "facilitated and hastened a change in the settled norms around transitional justice." They posit that this hastening has been achieved through a long series of dialogues between courts—both internal and international—and government, and among non-state actors, such as NGOs, the media and academia. The authors use the term "shadow effect" to describe the engagement of the courts, particularly the ICC, with the peace process in a way which nurtured transition within a framework of legal accountability.

The authors point out that this outcome confounded expectations because, during four years of negotiations, many had predicted that the involvement of the two courts would impede the peace process. The Colombian experiment is certainly instructive, but can it be seen as a blueprint for changing "the settled norms of transitional justice?" As the authors of the article point out, "Colombia has more stable institutions and a stronger domestic judiciary than any other situation before the ICC." This post will query whether any of the lessons from Colombia are applicable to sub-Saharan Africa, where the ICC has focused all of its prosecutions, and whose states, in the main, suffer from weak institutions and destabilizing ethnic contestation.

I have drawn this blog from qualitative research, funded by the British Academy, into the engagement of the ICC with two East African states, Kenya and Uganda, where the court has been seen as anything but a midwife of accountability. My research included some thirty semi-structured interviews with civil society representatives, including judges and advocates, about the ICC and the so-called "impunity gap" in Africa. I supplement this ethnography with more general observations about the performance of the ICC's Office of the Prosecutor (OTP) over a decade and a half.

Sparring with the ICC

A plethora of explanations have been offered for Africa's growing disaffection with the ICC. Mueller suggests that initial support for the court was strong as long as its investigations centered on non-state actors such as the Lord's Resistance Army, but when the focus shifted toward ex-heads of state and even serving presidents, self-preservation became the dominant response. This ICC challenge to the principle of immunity from prosecution for leaders and senior officials for genocide, war crimes and crimes against humanity is anathema to the African Union (AU) and was condemned by the Assembly of the AU, meeting in Equatorial Guinea in July 2014.

For Evelyne Owiye Osaala, primary responsibility lies with the UN Security Council (UNSC) for being "selective in the recognition and waiver of immunities for international crimes in favour of the interests of its permanent members." This argument is commonly voiced on the African continent by those who believe that President George W. Bush and Prime Minister Tony Blair should have been held to account legally for the invasion of Iraq in 2003. For many, the thesis that the UNSC demonstrates partiality was strengthened by the capture of the former Ivory Coast president, Laurent Gbagbo, by French and American troops in 2011 when Paris and Washington demonstrably threw their weight behind Gbagbo's election opponent, Alessane Outtara.

By contrast, Nel and Sibiya point out that the ICC has opened preliminary investigations in Iraq, Colombia, Afghanistan and Georgia, "thereby dispelling the myth that the ICC only focuses on situations in Africa."

The Bashir Effect

All of these assessments have merit, but the real issue is whether a subtler approach by the OTP, relying on a "shadow effect" rather than confrontation, might have done more to challenge long-cherished presumptions of the inviolability of presidents on the continent. It is undeniable that the March 2009 issuing of an ICC warrant for the arrest of Sudanese president, Omar al-Bashir, began the process of framing the court as an instrument of Western colonialism, a viewpoint summed up by the Gambia's then Information Minister, Sheriff Baba Bojang, who reportedly called the ICC "an international Caucasian court for the persecution and humiliation of people of colour, especially Africans."

The indictment did not deter Bashir from successfully testing the concept of impunity by visiting Nigeria for an African Union summit in 2013 and South Africa in 2015. The visit which provided the impetus for this research study was Bashir's visit to Uganda in 2016, when he attended the re-inauguration of President Museveni. At the ceremony, the Ugandan leader's attack on the ICC as "a bunch of useless people", provoked a walkout by the ambassadors of the US and Canada.

Like South Africa, Uganda had once been a proponent of the ICC and, indeed, was the first country to refer a case—that of the Lord's Resistance Army leader, Joseph Kony—to the court, after it came into being in 2002. Announcing the referral, Museveni and the ICC Prosecutor, Luis Moreno-Ocampo appeared at a joint press conference in London, which an opposition member of parliament in Uganda criticized as a misstep because it gave the impression that the OTP was doing the bidding of the Ugandan president. As if to assert his independence, Ocampo followed this up with a visit to Kampala at which he declared that he would "interpret the referral as concerning all crimes under the Rome Statute committed in Northern Uganda, leaving open the possibility of investigating alleged atrocities by government forces."

It is true that Ocampo's dealings with Colombia also opened up the possibility that the army, as well as the FARC rebels, might come under investigation from the court but crucially, the Colombian government eschewed a strategy of confrontation with the OTP for one of "judicial diplomacy." This entailed cooperating with all requests for information and for meetings with the OTP during field visits and in 2009, adopting the Rules of Evidence and Procedure of the ICC and ratifying the Agreement on the Privileges and Immunities of the Court.

This deft legal courtship between Colombia's institutions and the OTP made it unnecessary for one side to be seen as a supplicant and the other as a potential punisher. By contrast, in East Africa, a civil society with far shallower roots used the ICC indictment against Sudan's Bashir to lock horns with leaderships determined to uphold the immunity of heads of state, with predictable consequences. When Bashir made a return state visit to Uganda in November 2017, the Uganda Victims Foundation could have had little hope of success when filing an application at the International Crimes Division of the High Court for enforcement of the outstanding arrest warrants. The court duly declined to issue a provisional warrant and

instead fixed the hearing to a later date, "effectively quashing any attempts to arrest the Sudanese president."

The Kenyatta/Ruto Prosecution

As the "Judicialization of Peace" makes clear, the OTP could plausibly present the opening of a preliminary investigation in Colombia as a means of facilitating and nurturing the peace process. In Kenya, by contrast, the OTP failed to persuade the then government to voluntarily refer the post-election violence of 2007 to the ICC and so the prosecutor, for the first time in the court's history, had to use his *proprio motu* powers to initiate an investigation. The danger of thus "owning" the intervention—which led to indictments against President Uhuru Kenyatta and his deputy, William Ruto—was that the OTP would be as much on trial as were the defendants.

In 2007, Kenyatta and Ruto were bitter opponents and their tribal communities—Kenyatta's Kikuyu and Ruto's Kalenjin—engaged in bloodshed which led to more than one thousand deaths, mainly in the Rift Valley. But, for the 2013 election, while under indictment from the ICC, they formed an alliance which effectively subverted the notion of "victim-centered justice," so central to the ICC's mandate. A report by the civil society alliance, Kenyans for Peace with Truth and Justice, put it like this:

> In a strange ironical reversal, Mr Kenyatta and Mr Ruto now presented themselves as victims, the hapless targets of an imperialistic plot against Africans. A plot, moreover, that would ultimately undermine democracy in Africa by blocking reconciliation efforts, such as those that the political alliance headed by Uhuru, representing the Kikuyus, and Ruto, representing the Kalenjins was purportedly trying to achieve. In turn, the ICC was cast as the pliant tool of a Western conspiracy against Kenya's sovereignty.

The Weakness of the Office of the Prosecutor

When the trial began in The Hague, it became apparent early on that the OTP was struggling. The prosecutor, Fatou Bensouda, later complained that over half the witnesses in the case against William Ruto withdrew or retracted their initial testimony, and others were killed or bribed in the Kenyatta case:

> The level of interference with those witnesses was such that it started before; it was maintained throughout the cases; and even after. My office was trying to find various ways to protect and preserve the evidence and bring it before the judges This was a huge challenge, including their own protection as well as that of most of their families. We were having to protect witnesses even against their own communities; it became very complicated in the end. Not only were the witnesses pulling away from the case, but there were even attempts at interfering with their family members.

Lawyers interviewed for this research argue that the OTP should have expected this level of non-cooperation, which makes its determination to go ahead with the prosecution all the more surprising (a similar interpretation can be made about the case against Laurent Gbagbo which also collapsed at trial in early 2019). Here again, by exercising its "shadow effect," the ICC may have a more potent, if less showy, weapon than by prosecuting. After all, faced with an unwillingness to cooperate by a state, the OTP has none of the resources available to a domestic prosecutor, such as subpoenas, surveillance and policing, and cannot visit the scenes where the crimes were perpetrated without the acquiescence of national state authorities.

In the Kenyatta case, requests for information from the Kenyan authorities went unanswered and the Attorney-General refused to hand over phone, land and asset records. But lawyer, Gary Summers, who was part of the Kenyatta defense team from August 2011 onwards, believes the OTP can't escape blame for the failure of the prosecution:

> It was amateurish. You can't just rely on human rights NGOs to find witnesses and interview them. You needed trained investigators on the ground in Kenya to check the sources of some of the allegations. The OTP relied far too heavily on the report of the Waki Commission [the commission set up by the Kenyan government in 2008 to investigate the post-election violence of the previous year] to find witnesses. Indeed, the case against Kenyatta started with a single informant, Witness, no 4. The ICC needs a prosecutor who is ruthlessly focused on the target. This wasn't the case with either Ocampo or Fatou Bensouda (Interview with author, October 29, 2016).

Edigah Kavulavu of the International Commission of Jurists, Kenya Section, supported the prosecutions but remains disappointed by the way they turned out:

> The general mood here was that we would get justice through the ICC. And that the Kenyan case would be an example to the rest of the world. But the OTP only had a small outreach office in Nairobi, from where witnesses were interviewed. And there was no proper profiling of victims. The OTP based its judgements about witnesses/victims almost entirely on information from civil society NGOs. And when the case finally opened in court, it was obvious that Ocampo was not trial-ready (Interview with researchers, November 1, 2016).

Searching for any positive legacy of the Kenyatta/Ruto prosecution, it should be noted that it was the catalyst for discussions leading to the setting up of an International Crimes Division in Kenya's High Court to make good on the promise of complementarity.

Likewise in Uganda, following the 2008 Juba Peace Agreement between the government and the Lord's Resistance Army, a war crimes division was established in the High Court (later rebranded, when Uganda adopted the International Criminal Court Act, as the International Crimes Division). Nevertheless, the performance of the ICC in Africa has been a poor one, as it continues to grapple with the ongoing geo-political turbulence of internecine and inter-state rivalries.

The Individual or the Community?

This blog has sought to examine the fractious relationship between the ICC and Africa through the prism of the "judicialization of peace" achieved in Colombia. It has pointed out the significant differences between a state with relatively stable institutions underpinned by a self-confident civil society and countries where the impunity of leaders may have been challenged but not overturned. But there is another distinction which has to be considered.

The ICC was established to try crimes committed by individuals rather than states, and in prosecuting Uhuru Kenyatta, the ICC addressed his individual criminal liability for crimes committed during the 2007 post-election violence rather than putting the state of Kenya on trial. However, within Kenyan society, Kenyatta's individuality is intimately bound up with a heritage of Kikuyu patrimonial obligations. Historically in this patron-client arrangement, there is "a shared understanding of the appropriate relationship between leaders and their communities that gave rise to complex moral economies in which rulers were expected to provide for their followers in return for their support."

In Uganda, Museveni, from the Bahima tribe, is seen as a bulwark against the "troublesome" Acholi of the northern region (from which the Lord's Resistance Army sprang). In other words, in these East African countries, a criminal prosecution of the patron can be presented as an attack on the clan, raising the possibility of all those dependent on the patron being deprived of material benefits and political influence if he is brought down. In these circumstances, it was all too easy for the embattled Kenyatta to make a case that, as the representative of the largest ethnic group, he embodied the nation, standing resolute against

an alien, Western-backed institution, the ICC. With the African Union implacably opposed to the court, the post-Enlightenment notion of individual responsibility and culpability is steadily being reinterpreted on the African continent as a concept of collective condemnation and the ICC made to look like the cuckoo in the nest.